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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

OPT GOLDEN HILLS VAC LLC,

Plaintiff and Appellant,

v.

SAV MAX FOODS, INC.,

Defendant and Appellant.

A123764

(Solano County
Super. Ct. No. FCS026884)

ORDER MODIFYING OPINION
AND DENYING REHEARING
[NO CHANGE IN JUDGMENT]

It is ordered that the opinion filed herein on February 9, 2010, be modified as follows:

1. On page 19, the third sentence of the third full paragraph should be modified to read as follows:

   Thus, by virtue of this language, Sav Max made a binding representation that those facts and condition of the premises were not, and would *not* with either notice or lapse of time, or both, become a default.

2. On page 20, the first sentence of the first paragraph should be modified to read as follows:

   However, under the law, Sav Max could not take one position in the estoppel certificate—i.e., that there were no facts and circumstances that, with notice or lapse of time, or both, could lead to a default—and take the opposite position only months later—i.e., that the facts and circumstances in existence and known to Sav Max at the time it executed the estoppel certificate were, indeed,

a breach of the lessor's obligations under the Lease and would, with notice and the passage of time, ripen into a default, resulting in termination of the Lease.

3. On page 20, the third sentence of the second full paragraph should be modified to read as follows:

   The language Sav Max added to the end of the fourth sentence of the paragraph, excepting "the recent theft of wiring . . . and damage to certain switching gear," did not alter the explicit representation made in the first sentence as to the absence of any current default, or prospective default upon notice or lapse of time.

4. On page 22, the first sentence of the second full paragraph should be modified to read as follows:

   Sav Max also argues the estoppel certificate did not "amend" the Lease or "excuse" OPT from any landlord obligations imposed thereunder, including under Section 13 to provide electrical service to the building.

5. On page 22, immediately following the first sentence of the second paragraph, which reads "Sav Max also argues the estoppel certificate . . . to the building," footnote 8 should be inserted (all subsequent footnotes should be renumbered accordingly) and read as follows:

   And, Kirkpatrick had the obligation to provide electrical service to the building prior to the sale, an obligation Sav Max knew Kirkpatrick had breached. Yet, it asserted in the estoppel certificate Kirkpatrick had "fulfilled all of its duties and obligations under the Lease . . . [and was not] in default under the terms, covenants or obligations of the Lease."

6. On page 23, the third sentence of the first full paragraph should be modified to read as follows:

   These representations and assurances told OPT that Kirkpatrick had fulfilled all obligations under the Lease, was not currently in default under the Lease, there were no facts and circumstances that with notice or the lapse of time would lead to a default and further told OPT it would not, in any event, be liable for any act or omission of a prior landlord.

7. On page 23, the following two paragraphs should be inserted immediately after the first full paragraph and before section E of part III of the Analysis:

Sav Max asserts that even if the estoppel certificate prevented it from asserting any "default" on the part of OPT, the Lease still terminated "by its own terms" under Section 16B, arguing "OPT's election not to repair could not and did not ripen into a default." (Emphasis omitted.) As noted above, Section 16B provided in pertinent part that if, during the final seven years of the Lease, a casualty precluded the lessee from using more than 25 percent of the floor space, the lessee had 30 days to give notice of its intent to exercise any option to continue the Lease. If such notice was not given, the lessor then had 30 days to elect to repair or not to repair. If the lessor failed to give notice of an election to repair, the Lease was deemed terminated as of the date of the casualty. While an "election not to repair" under Section 16, in and of itself, would not be a "default," what Sav Max fails to acknowledge is that the condition of the property here, with notice, also would inexorably become a default (e.g., failure to provide electrical service to the building as required under Section 13, failure to maintain the common areas (from which much of the electrical equipment was taken) as required under Section 2, failure to permit "quiet enjoyment" of the premises as required under Section 1). Indeed, Sav Max recognized this in its August 12, 2005, letter wherein it not only reiterated its position the Lease had terminated under Section 16B, but also asserted OPT's "failure to make, or even commence making, repairs after notice resulted in an uncured and now incurable *default*." (Italics added).

Further, Sav Max's argument that no "default" was involved and the Lease terminated by its own terms under Section 16B, depends on its assertion that it gave adequate notice to OPT to trigger the section. As discussed, Sav Max maintained at the time of the events in question and throughout trial that its May 5, 2005, letter to Kirkpatrick and its June 1, 2005, fax to Lomas (attaching its May 5 letter) constituted adequate notice to OPT to trigger Section 16B. We do not agree. These short communiqués nowhere mentioned loss of use of more than 25 percent of the floor space, Section 16, or potential termination of the Lease. Not until its August 1, 2005, letter did Sav Max make any claim it had been deprived of more than 25 percent of the floor space or that the termination provisions of Section 16B applied. That letter, however, cannot fairly be read as "notice" to OPT triggering any time period under Section 16B. On the contrary, the August 1 letter is predicated on the "notice" Sav Max supposedly gave May 5 and June 1. And it is an unequivocal assertion by Sav Max that the Lease "*has terminated* by its own terms, effective as of the date of the casualty" and unequivocal demand for the return of previously paid rent. (Italics added.) Sav Max cannot hang its hat on a letter that (a) asserted termination already had occurred (and occurred

before OPT even owned the property), and (b) was based on notice that was manifestly insufficient.

There is no change in the judgment.

Respondent Sav Max's petition for rehearing is denied.

Dated:

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Marchiano, P. J.